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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 WILFREDO GOLEZ

11 Plaintiff,

12 vs.

13 JOHN E. POTTER, POSTMASTER
14 GENERAL; U.S. POSTAL SERVICE

15 Defendants.

CASE NO. 09-cv-965 AJB (WMc)

**ORDER DENYING MOTION TO
COMPEL [DOC. NO. 118.]**

16 **I. INTRODUCTION**

17 On November 1, 2011, Plaintiff *pro se* Wilfredo A. Golez (“Golez”) filed a motion to
18 compel the work attendance records of two former co-workers who are not parties to the instant
19 litigation. [Doc. No. 118, pp. 2-3.] Golez states he requires the employment records of his former
20 co-workers to show other employees who were late were not terminated as he was, and therefore
21 rebut Defendants’ contention that his own attendance irregularities led to termination. *Id.* at 3.
22 Plaintiff argues he was improperly terminated during FMLA protected absences. *Id.*

23 Defendants object to Plaintiff’s motion to compel on the grounds of untimeliness,
24 overbreadth and privacy protections under the Privacy Act of 1974. [Doc. No. 126, pp. 1-3.]

25 **II. STANDARD OF REVIEW**

26 Federal Rule of Civil Procedure 26(b)(1) states: “unless otherwise limited by court order,
27 the scope of discovery is as follows: Parties may obtain discovery regarding any **nonprivileged**
28 matter that is relevant to any parties claim or defense-including the existence, description, nature,

1 custody, condition, and location of any documents or other tangible things and the identity and
 2 location of persons who know of any discoverable matter.” Fed. R. Civ. P. 26(b)(1) (emphasis
 3 added.)

4 In this litigation, Defendants object to the production of non-party employee attendance
 5 records on privacy grounds as reflected by the Privacy Act of 1974 which provides:

6 “No agency shall disclose any record which is contained in a system of records by any
 7 means of communication to any person, or to another agency, except pursuant to a written
 8 request by, or with the prior written consent of, the individual to whom the record
 9 pertains.”

10 *See* 5 U.S.C. §552a(b).

11 In addition to the rule set forth in the Privacy Act of 1974, federal courts generally
 12 recognize a privacy right that can be raised in response to discovery requests. *Johnson ex rel*
 13 *Johnson v. Thompson*, 971 F.2d 1487, 1497 (10th Cir. 1992) (denying discovery of names of
 14 participants in a medical study due to privacy interests of the individual participants). The party
 15 whose privacy is affected may object, as Defendants have done here, or seek a protective order.
 16 *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987). Resolution of a privacy objection or
 17 request for protective order requires a balancing of the need for the particular information against
 18 the privacy right asserted. *Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548, 550-551 (E.D.
 19 Cal. 1990) (balancing targeted individual’s right of privacy against public’s need for discovery in
 20 employment discrimination case.)

21 **III. DISCUSSION**

22 **Defendants’ Privacy Objection is Sustained**

23 The exceptions allowed in the Privacy Act of 1974 are not applicable here as: (1) Plaintiff
 24 is not requesting his own time records, but the attendance records of non-parties, and (2) the
 25 persons whose records Plaintiff seeks have not given permission for their release. Accordingly,
 26 the Privacy Act of 1974 precludes the United States Postal Service from complying with Plaintiff’s
 27 discovery request. Moreover, the Court has carefully balanced Plaintiff’s stated need for the
 28 attendance records of his former co-workers with the privacy rights of employees in their
 personnel records and finds Plaintiff’s need does not outweigh the privacy rights of the non-parties
 whose attendance records he seeks. Plaintiff has received his own time and attendance records as

1 well as his 3971 forms (Request for Notification of Absence) from Defendant which are relevant
2 to his contention that he was improperly terminated during FMLA protected absences. The
3 attendance records of Plaintiff's former co-workers who are not parties to this case are not relevant
4 and not likely to lead to the discovery of admissible evidence. Fed. R. Civ. Proc. 26(b)(1).
5 Therefore, Plaintiff cannot justify their disclosure in the face of recognized privacy rights.

6 **IV. CONCLUSION AND ORDER THEREON**

7 For the reasons articulated above, the Plaintiff's Motion to Compel is **DENIED**. Pursuant
8 to Local Civil Rule 7.1 (d)(1), the Court has found Plaintiff's Motion to Compel suitable for
9 decision without oral argument. Accordingly, the teleconference on Plaintiff's motion to compel
10 currently scheduled for December 8, 2011 at 4:30 p.m. is **VACATED**.

11 **IT IS SO ORDERED.**

12 DATED: November 29, 2011



Hon. William McCurine, Jr.
U.S. Magistrate Judge
United States District Court